IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel. SAMMIE KELLEY,	)	
Petitioner,	)	
v.	)	**Case No. 98 C 4707**
J. RONALD HAWS,	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

On February 9, 1983, Sammie Kelley made sexual advances toward a total stranger at a pay phone outside the Foxy Lady Lounge in Chicago. The woman, Gail Harrison, snubbed him, and went back inside the bar. Kelley followed her, they exchanged words, and he left. But he returned a short time later; this time, waving a gun. He fired into the crowded bar, seriously injuring three people, and ran out the door. Several patrons chased him down and held him--and his gun--until the police arrived. At some point in the ruckus, Kelley was stabbed in the back, so the police took him to Holy Cross Hospital for treatment. At the hospital, the police read Kelley his rights, and Kelley then gave a statement. About two and a half hours after the shooting, the police brought Elnora Russell, who had been at the Foxy Lady at the time of the shooting, to Kelley's hospital room, where she identified him as the shooter.

The state charged Kelley with three counts each of attempted murder, aggravated battery causing great bodily harm, aggravated battery using a deadly weapon, and armed violence. The day

trial was set to begin, the state told the court and defense counsel that it intended to offer, through Elnora Russell, that Kelley said, from his hospital bed, "what's the big deal? I just shot a few niggers." Kelley's attorney initially said nothing and the court proceeded with jury selection. But the next day, before the trial actually started, Kelley's attorney moved to suppress that statement because it was part of Kelley's earlier hospital statement to the police, which the court had already ruled should be suppressed. After an offer of proof, the court allowed the statement to come in through the testimony of Elnora Russell.

The trial came down to a credibility contest: the state's witnesses, including the people Kelley shot and the man who chased Kelley out of the bar, tackled him and took the gun from him, testified that Kelley was the shooter; Kelley's witnesses, who claimed to be in or near the bar at the time of the shooting, testified that Kelley was not the shooter. The jury convicted Kelley of the armed violence and aggravated battery counts, but it acquitted him of the attempted murder charges. Kelley's attorney moved for a new trial, presenting two additional witnesses for the Court's consideration; Judge Heyda denied the motion and, after hearing arguments and evidence in mitigation and aggravation, sentenced Kelley, on the three armed violence counts only, to concurrent terms of forty years.

Kelley appealed, arguing that the trial court should have barred Elnora Russell from testifying either as a discovery sanction because the state did not disclose her or the contents of her testimony until the morning of trial, or because the statement to which Russell testified was a confession which the state was obligated to disclose under the Illinois Supreme Court Rules. Kelley also argued that because the armed violence charges were premised on the charges of aggravated battery with a deadly weapon, convicting him of both amounted to a double enhancement in violation of *People v. Haron*, 85

Ill. 2d 261, 422 N.E.2d 627 (1981). The Illinois appellate court affirmed Kelley's conviction and sentence on June 14, 1985. A month later Kelley filed a petition for leave to appeal (PLA) in the Illinois Supreme Court, raising the same arguments he raised to the appellate court. The Supreme Court denied Kelley's petition on October 2, 1985.

On January 2, 1986, Kelley filed a *pro se* petition for post-conviction relief in which he rehashed his appellate arguments about Russell's testimony. He also raised, for the first time, an ineffective assistance of counsel claim based on his attorney's failure to object when the state disclosed Russell as a witness. Finally, he claimed that his 40-year sentence was unconstitutionally excessive. After numerous continuances that are unexplained in the record, in August 1994 the Public Defender of Cook County filed a supplemental post-conviction petition alleging that Kelley's trial counsel was ineffective for failing to request a continuance when the state disclosed Russell as a trial witness and for failing to object to improper remarks the state made in closing arguments; the supplemental petition also alleged prosecutorial misconduct and ineffective assistance of appellate counsel for failing to raise the ineffectiveness of trial counsel claim. After a hearing, the judge denied Kelley's petition, and Kelley appealed, once again claiming ineffective assistance of trial counsel and ineffective assistance of appellate counsel. The appellate court affirmed the denial of post-conviction relief and denied Kelley's request for rehearing. Kelley then filed a second PLA with the Illinois Supreme Court, raising the double enhancement claim, the ineffective assistance of trial and appellate counsel claims and the prosecutorial misconduct claim. He also claimed that the appellate court erred in affirming the denial of post-conviction relief and in refusing to rehear his petition. The court denied Kelley's second PLA on December 3, 1997.

On July 29, 1998, Kelley filed a *pro se* habeas corpus petition claiming that he is entitled to relief on roughly thirty grounds (including subparts), some old and some new.

ANALYSIS

A. Non-Cognizable Claims

It appears from the outset that some of Kelley's claims simply cannot form a basis for habeas corpus relief under 28 U.S.C. §2254, and we quickly dispose of them. First, Kelley claims that the jury's verdicts on the armed violence and aggravated battery counts were legally inconsistent and constituted double enhancement (Ground for relief A(1) in Kelley's habeas corpus petition). This claim challenges the trial court's application of Illinois' armed violence statute and is therefore beyond the scope of what this Court is permitted to address in an action under 28 U.S.C. §2254. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.").

Second, Kelley claims that the trial court erred when it refused to appoint counsel other than the Cook County Public Defender's Office to represent him and when it erroneously dismissed his petition for post-conviction relief without granting an evidentiary hearing (F(1) and (2)). As to the former, the United States Constitution did not require the court to appoint any lawyer, let alone a second lawyer, to represent Kelley in post-conviction proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); thus the failure to appoint a lawyer cannot constitute a federal constitutional violation. Indeed, both aspects of this claim involve the state court's interpretation of Illinois law (the

Post-Conviction Hearing Act), which is not something we review under 28 U.S.C. §2254. *See Estelle*, 502 U.S. at 67-68.

Third, Kelley claims that his appellate counsel was ineffective on post-conviction appeal when he failed to raise claims concerning Kelley's right not to testify and the significant delay in the post-conviction proceedings (G(1) and (2)). The habeas corpus statute expressly states that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. §2254(i). *See also Anderson v. Cowan*, 227 F.3d 893, 901 (7th Cir. 2000) ("[A] criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals"; "[i]n proceedings in which a petitioner does not have a constitutional right to counsel, 'a petitioner cannot claim constitutionally ineffective assistance of counsel . . . .'") (quoting *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991)).

Fourth, Kelley claims that he is entitled to habeas corpus relief because the Illinois appellate court erred when it affirmed the denial of post-conviction relief and when it declined his request for rehearing. Kelley specifies a number of ways in which the appellate court misapplied or misunderstood the law (H(1)-(5)). Even if the appellate court did misunderstand and misapply the law as Kelley says, the question of whether a state court correctly applied its own law cannot, by itself, form the basis of a habeas action. *See Biskup v. McCaughtry*, 20 F.3d 245, 247 (7th Cir.1994).

Fifth, Kelley claims that the Illinois Supreme Court erred when it denied his PLA (I(1)). Kelley does not explain whether he is challenging the denial of his direct appeal PLA or his post-conviction PLA. But in either case, review in the Illinois Supreme Court is discretionary, *see* Ill. Sup. Ct. R.

315(a); this claim does not present a violation of federal law. *See Estelle*, 502 U.S. at 67-68.

B. Procedural Default

Before a federal court may review the merits of a petition for habeas corpus, the petitioner must: "(1) exhaust all remedies available in state courts; and (2) fairly present any claims in state court first, or risk procedural default." *Bocian v. Godinez*, 101 F.3d 465, 468 (7th Cir. 1996). Exhaustion is not an issue in this case; Kelley unsuccessfully pursued--all the way to the Illinois Supreme Court--both a direct appeal of and a collateral attack on his conviction and sentence, and he has no further avenue of relief in state court. Procedural default, however, is an issue with respect to all but one of Kelley's remaining claims.

Procedural default occurs when the petitioner fails to present a claim to the state courts at the time, and in the way, required by the state. *See United States ex rel. Gallo v. Gilmore*, No. 98 C 2484, 2000 WL 347923, at *6 (N.D. Ill. March 31, 2000) (citing *Hogan v. McBride*, 74 F.3d 144, 146 (7th Cir. 1996)). In Illinois, issues that could have been raised on direct appeal but were not are considered waived, and failure to pursue in a state post-conviction petition those claims that could not have been brought on direct appeal results in a waiver of those claims. *See Gallo*, 2000 WL 347923, at *6 (citing *Illinois v. Coleman*, 168 Ill. 2d 509, 522, 660 N.E.2d 919, 927 (1995) and *Farrell v. Lane*, 939 F.2d 409, 411 (7th Cir. 1991)).

A number of Kelley's claims are procedurally defaulted because he raised them for the first time in his habeas corpus petition. The Court reviewed the entire state court record in this case and found no reference to the following claims: Kelley's claim that the state failed to offer sufficient evidence to prove that he intended to commit the armed violence offenses of which he was convicted (A(2)); his

claim that his trial counsel was ineffective for failing to seek a mistrial based on the state's discovery violation (B(6)); and his claim that the trial court erred by punishing him for taking his case to trial (E(1) and (2)). Because Kelley never gave the state courts any chance--let alone a fair chance--to consider these claims, they are procedurally defaulted. *See Rodriguez v. Peters*, 63 F.3d 546, 555 (7th Cir. 1995).

Similarly, a number of Kelley's claims are procedurally defaulted because he raised them for the first time in his post-conviction PLA. He did not raise them in his post-conviction petition or on appeal from the denial of post-conviction relief; nor did he raise them on direct appeal. In other words, he failed to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). This is the case with Kelley's claim that trial counsel was ineffective for failing to call hospital personnel at trial and failing to properly prepare for trial (B(3), (4)); his claim of prosecutorial misconduct (all aspects except the claim of misconduct based on the state's attempt to shift the burden of proof to the defendant) (C(1)-(3), (5)-(7)); and his claim that appellate counsel was ineffective on direct appeal (D(1)). All but one of Kelley's ineffective assistance of trial counsel claims and all of his prosecutorial misconduct claims (B(1), (3)-(7) and C(1)-(7)) are also barred because they could have been raised on direct appeal but were not. *See Britz v. Cowan*, 192 F.3d 1101, 1103 (7th Cir. 1999) (Illinois law requires that a challenge made to the effectiveness of trial counsel be made in the direct appeal if the basis for the challenge is apparent from the trial record), *cert. denied*, 529 U.S. 1006 (2000); *Franklin v. Gilmore*, 188 F.3d 877, 883 (7th Cir. 1999) (under Illinois law, issues that could have been raised on direct appeal, but were not, are deemed waived), *cert. denied*,

529 U.S. 1039 (2000) (citing *People v. Moore*, 177 Ill. 2d 421, 686 N.E.2d 587, 591 (1997)). His claim that the trial court punished him for taking his case to trial (E(1)-(2)) is barred for the same reason.

C. Excuses for Procedural Default

On his procedurally defaulted claims, Kelley "may obtain federal habeas relief only upon a showing of cause and prejudice for the default or upon a showing that the failure to grant him relief would work a fundamental miscarriage of justice." *Thomas v. McCaughtry*, 201 F.3d 995, 999 (7th Cir. 2000). Kelley contends that he can satisfy both the "cause and prejudice" and the "miscarriage of justice" exceptions, though he does not elaborate on either contention. As explained below, the Court finds that neither exception applies.

Even assuming Kelley could show cause for the defaults (which he has not done), he cannot show the prejudice required to excuse his defaults. The definition of "prejudice" in this context is far from clear. *See United States v. Frady*, 456 U.S. 152, 168 (1982) ("in *Wainwright v. Sykes* we refrained from giving 'precise content' to the term 'prejudice,' expressly leaving to future cases further elaboration of the significance of that term . . . . [T]he import of the term in [some] situations thus remains an open question . . . ."). *See also* James Liebman & Randy Hertz, *Federal Habeas Corpus Practice & Procedure* §26.3c (noting that the possible tests for prejudice range from the stringent "harmless error beyond a reasonable doubt" test explained in *Chapman v. California*, 386 U.S. 18 (1967) to the less stringent "reasonable probability that the proceedings would have been different" test enunciated in *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); Maria L. Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause & Prejudice*, 53 Fordham L.

Rev. 663 (March 1985) (recognizing the need for an operative definition of the term prejudice). What is clear, however, is that Kelley cannot satisfy even the least stringent test for prejudice.

Kelley first claims that the state failed to offer sufficient evidence to prove his "mental state of mind to commit the alleged armed violence offenses and aggravated battery offenses." *See* Petition for Writ of Habeas Corpus, p. 19. At trial, Gail Harrison testified that after she spurned Kelley's advances outside the bar, he followed her back inside and told her "I'll be back to get you, bitch." Trial Transcript, p. 253. Muriel Womack, who was sitting with Harrison and her friends in the bar, testified that she heard Kelley say he was going to come back and "kill all you bitches." *Id.* at 305. Womack also testified that after Kelley made the threat, he left the bar, and that she saw him back in the bar about a half hour later, with a gun in his hand. *Id.* at 305-06. Johnson Smith testified that he saw Kelley confront Harrison, though he could not hear what he said, and that he saw Kelley back in the bar about twenty-five minutes later waving a gun. *Id.* at 276-77. Additionally, several of the state's witnesses testified that they saw Kelley come into the bar with a gun and/or saw him fire it into the crowded bar. *See, e.g.*, Trial Transcript, pp. 225-28 (James "Al" Mullens), p. 262 (Gloria Hannah); pp. 316-18 (Reginald Gildersleeve). Thus, Kelley's assertion notwithstanding, the state provided ample evidence from which a jury could reasonably find that Kelley intended to commit the armed violence and aggravated battery offenses. Kelley cannot show that he is prejudiced by the procedural default of this claim.

Kelley next claims that he is entitled to habeas corpus relief because his trial attorney was constitutionally ineffective. To prove a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness; and (2) the

defendant was prejudiced in that, but for counsel's substandard representation, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Kelley claims that his attorney was ineffective in various ways relating to the tardy disclosure and admission of a statement Kelley made while he was in the hospital about two and a half hours after the shooting took place. According to Elnora Russell, who was taken by police into Kelley's room to identify him as the shooter, Kelley spontaneously remarked "what's the big deal? I just shot a few niggers" when she and the detective were leaving Kelley's room; the morning of trial the state disclosed the statement and that Russell would be testifying to the statement. Kelley argues that his attorney was ineffective because he failed to object to the disclosure of the hospital statement on the grounds that it was a discovery violation, failed to object to the hospital show-up, failed to call hospital personnel at trial to testify about Kelley's condition at the time he made the statement, and failed to seek a mistrial based on the state's discovery violation. Kelley argues that, if his attorney had represented him in an objectively reasonable manner, he would have been able to keep that statement from the jury; at a minimum, he would have been able to lessen the impact of the statement by presenting evidence that Kelley was out of his head and doped up on pain killers when he said it. But the state's identification evidence was hardly limited to Kelley's hospital-bed confession or Russell's hospital identification. As we have already noted, Al Mullens, Gloria Hannah and Reginald Gildersleeve all said they saw Kelley do the shooting. Indeed, if the jury believed Al Mullens' testimony, there was no question as to who did the shooting: Mullens said he saw Kelley empty his gun into the crowded bar, then he chased Kelley outside, tackled him in the vacant lot next to the bar, took his gun, and held him and the gun until the police arrived. Thus Kelley cannot show that the proceedings would have turned out differently if

Russell's testimony had not come in or if he had been able to put on evidence to soften the blow of her testimony; he therefore was not prejudiced by his procedural default of these aspects of his ineffective assistance of counsel claim.

Kelley has more to say about his attorney's representation: he claims that his attorney failed to prepare properly for trial. Kelley complains that his attorney failed to interview defense witnesses prior to trial and that, as a result, he was unable to impeach Rodney Parks, one of the shooting victims who testified for the state. At trial, Parks testified that he never saw the shooter's face; although he provided a general description of the shooter, he could not identify Sammie Kelley as the shooter. *See* Trial Transcript, pp. 284, 286, 289, 300. Kelley's attorney told the court, outside the presence of the jury, that Parks had told him in earlier conversations that he (Parks) believed there was no way Sammie Kelley could have been the shooter because Kelley was standing right next to him and he (Parks) would have seen him. Kelley's attorney wanted to impeach Parks on this issue, but because he had no "prover" present when he had the conversations with Parks, the only thing he could have done was to seek to withdraw in the middle of trial and serve himself as a witness in Kelley's behalf. Kelley's attorney's conduct--if not his failure to have a prover present at the Parks interviews, then certainly his failure to withdraw to serve as a witness--was unreasonable. *See People v. Burrows*, 148 Ill. 2d 196, 247, 592 N.E.2d 997, 1019 (1992). But impeaching Parks would have made no difference in the outcome of the trial. For one thing, Parks did not identify Kelley as the shooter; in fact, he specifically said he could not do so. *See* Trial Transcript, p. 289 (Q: Can you identify this man as the man who did the shooting that night? A: I could not.); p. 300 (Q: I'm going to have my client stand up, and ask you if you can identify him as the man who did the shooting that night. A: His size could fool me, but

personally, I could not identify him. Honestly.). Moreover, even if Kelley's attorney had been able to get Parks to say, with 100% certainty, that Kelley was not the shooter, the evidence would have been cumulative. Kelley's attorney presented six witnesses who testified that Sammie Kelley was not the shooter, but the jury still chose to believe the state's witnesses who said that he was. The Court has no reason to think that one additional witness in Kelley's camp would have made any difference in the outcome of the trial.

Finally, Kelley claims that his attorney was ineffective in failing to object to improper remarks the prosecutor made during his closing argument. As we discuss below, we do not believe that the prosecutor's remarks were improper; we therefore cannot say that counsel's failure to object to them was objectively unreasonable. This aspect of Kelley's ineffective assistance claim, like the others, fails to satisfy the *Strickland* test. Thus, Kelley was not prejudiced by his procedural default of this claim.

In his prosecutorial misconduct claim, Kelley argues that the prosecutors willfully violated discovery rules in failing to disclose the substance of Elnora Russell's testimony until the morning of trial; called the jury's attention to his not having to testify at trial; improperly attacked his attorney; tried to shift the burden of proof; improperly relied on inflammatory argument; and expressed personal opinions, misstated the evidence, and assumed unproven facts. We have already addressed the discovery violation aspect of this claim; we find that any discovery violation did not prejudice Kelley because the testimony brought in through the violation was cumulative. The remaining aspects of Kelley's prosecutorial misconduct claim all challenge statements made by the state during closing arguments. Review of this claim reveals that Kelley has failed to establish the prejudice necessary to excuse his procedural default.

When analyzing allegations of prosecutorial misconduct during closing argument, we look at the disputed remarks in isolation to determine if they are proper; if they are, our analysis ends. *United States v. Badger*, 983 F.2d 1443, 1450 (7th Cir. 1993). If we find the statements are improper, we look at the remarks in light of the entire record to determine if the defendant was deprived of a fair trial. *Id.* (citing *United States v. Gonzalez*, 933 F.2d 417, 430 (7th Cir. 1991)). We consider the nature and seriousness of the prosecutorial misconduct; whether the prosecutor's statements were invited by conduct of defense counsel; whether the trial court instructions to the jury were adequate; whether the defense was able to counter the improper arguments through rebuttal; and the weight of the evidence against the defendant. *Id*. (citations omitted).

Kelley first argues that the prosecutor improperly commented on his decision not to testify. During his rebuttal closing argument, the prosecutor said as follows:

> Mr. Kelley has no burden. He didn't have to present any witnesses. It's up to him. The defendant doesn't have to testify, and he didn't, and you can draw no conclusions from the fact that he did not testify, and the judge will so instruct you, but when you do present witnesses, you should judge their credibility. You should judge their demeanor on the stand, and judge their bias, their motive for coming here. I submit to you that when you do, you will find that we have proven our case beyond a reasonable doubt. Trial Transcript, p. 612.

Although we of course agree that a prosecutor should never comment on a defendant's failure to take the stand, the prosecutor here said nothing more than the court's instructions told the jury. Presumably with Kelley's approval, the court gave instruction number 1.02 of the Illinois Pattern Jury Instructions for criminal cases, which advised the jury that it was the sole judge of the witnesses' believability and of the weight to be given to the testimony of each; the court gave IPI Criminal 2.03, which instructed the jury that the defendant is presumed to be innocent and that the burden of proving him guilty beyond a

reasonable doubt rests solely with the state; and it also gave IPI Criminal 2.04, instructing the jury that it should not consider the fact that the defendant did not testify in arriving at its verdict. *See* Trial Transcript, pp. 628, 632-33. The prosecutor's statement, even if improper, did not render Kelley's trial unfair.

Kelley next argues that the prosecutors improperly attacked defense counsel and defense witnesses, calling them liars and charging that the entire defense was made up. And, Kelley argues, some of the statements the prosecutors made about inconsistencies in testimony were wrong. Initially, as we have already noted, the case came down to a credibility contest--the state's witnesses said Kelley was the shooter; the defense witnesses said Kelley was not the shooter--so it is hardly surprising that the subject of witness believability came up in closing arguments. Indeed, Kelley's attorney made similar comments, trying to sway the jury to believe his witnesses and suggesting that his witnesses were more credible that the state's witnesses. *See* Trial Transcript, pp. 605-10. There was nothing improper in the state's responding to that charge by pointing out the inconsistencies in the defense witnesses' testimony. Additionally, the court specifically told the jurors when sustaining an objection during the closing arguments that they should not rely on what the lawyers said the evidence was, but should trust what they heard and saw at trial to determine what the evidence was. Trial Transcript, p. 600. The court also gave IPI Criminal 1.03, which instructed the jury that closing arguments are not evidence and that they should disregard any argument that is not based on the evidence. *Id.* at 629. These instructions were adequate to neutralize any improper influence the prosecutors' statements may have had.

Kelley argues that the prosecutor tried to shift the burden of proof to him by making statements

pointing out his failure to call certain witnesses. In particular, Kelley cites the prosecutors' statement about his failure to call anyone from the hospital to corroborate the fact that he was stabbed:

> There's been no evidence that he was stabbed. Did you hear any doctors or nurses or anybody else tell you this defendant was in intensive care? . . . Where are the people from Holy Cross Hospital who would tell you about how seriously injured the defendant was. Trial Transcript, p. 591.

But the question of whether Kelley was stabbed the night of the shootings was a bit of a red herring; no one denied that Kelley was injured that night, and at least one of the state's witnesses testified that Kelley was bleeding pretty badly. Kelley's attorney argued in his closing that the police did not care that Kelley was injured; he never argued--nor did he present evidence--that Kelley's injury would have prevented him from shooting up the Foxy Lady Lounge.

Kelley criticizes a number of other statements made by the prosecutors in closing and, to be sure, some of them were downright sophomoric--particularly this one: "I will bet you dinner at any restaurant you want in the city of Chicago that you can't think of one instance where he [Kelley] showed another witness contradicted any other witness." Trial Transcript, p. 621. But we cannot say that the prosecutors' closing argument "so infected . . . the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The evidence established that Kelley fired a gun several times into a crowded bar, was chased outside afterwards and tackled at the scene where he and his gun were held until the police arrived; the resulting conviction was perfectly in line with the evidence. We therefore conclude that Kelley has not shown prejudice from the procedural default of his prosecutorial misconduct claim.

Kelley next claims that the lawyer who represented him in his direct appeal was ineffective

because he failed to perfect Kelley's appeal on the issues raised in his motion for new trial and because he failed to raise claims of ineffective assistance of trial counsel and prosecutorial misconduct on direct appeal. Having concluded that Kelley is not prejudiced by the default of his claim of ineffective assistance of trial counsel, we cannot say that he was prejudiced by his appellate lawyer's failure to raise the issue. The same is true of the prosecutorial misconduct claim. As for the claims raised in the motion for new trial, the Court can find no evidence that those claims were foreclosed because of any failure on counsel's part. Those issues--principally the admission of Kelley's hospital statement through Elnora Russell's testimony and sufficiency of the evidence challenges--appear throughout the state proceedings, in one form or another, and in Kelley's habeas petition. As we have indicated in this opinion, even if those claims were foreclosed, Kelley has not been prejudiced by any inability to raise them.

Finally, Kelley claims the trial court erred when it prolonged the post-conviction proceedings for over nine years. While we agree that nine years is an inexcusably long time to wait for a ruling on a post-conviction petition, Kelley has not explained how he was prejudiced by the delay--he has not, for example, pointed to any evidence that was destroyed or allowed to go stale. Moreover, it appears that the delay was, at least in some part, attributed to his attorney's request for continuances; nothing in the transcript of proceedings or in Kelley's papers suggests that those requests were in any way improper.

Having concluded that Kelley cannot establish cause and prejudice to excuse any of his defaulted claims, we consider whether our failure to reach the merits of his petition will result in a "fundamental miscarriage of justice." The miscarriage of justice exception has been construed narrowly. A petitioner must show that "a constitutional violation has probably resulted in the conviction

of one who is actually innocent." *Thomas*, 201 F.3d at 999 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Actual innocence requires a showing that "in light of all the evidence, including that alleged to have been illegally admitted . . . the trier of the facts would have entertained a reasonable doubt of his guilt." *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n.17 (1986) (citation and quotation omitted). Significantly, none of the grounds for relief urged by Kelley suggests that he is actually innocent of the crimes for which he is doing time. The prosecution's evidence at trial showed that Kelley fired several shots into a crowded bar, seriously injuring three people, and that he was then caught red-handed with the gun and held until the police arrived. The jury had reasonable grounds to disbelieve Kelley's witnesses, and there was certainly more than ample evidence to establish beyond a reasonable doubt that Kelley shot Gloria Hannah, Rodney Parks and Johnson Smith.

D. Consideration of the Merits of Kelley's Remaining Ineffective Assistance Claim

As we have noted, one part of Kelley's ineffective assistance of trial counsel claim may not have been procedurally defaulted, and we therefore consider this part of the claim on its merits. Kelley claims that his attorney was ineffective for failing to request a continuance after the state disclosed the substance of Elnora Russell's trial testimony (B(2)). In his habeas corpus petition Kelley does not explain what, if anything, his attorney would have done if he had asked for and received a continuance. But in his post-conviction petition, where Kelley first raised this claim, he argued that his attorney would have--and should have--taken the time to interview, and secure the testimony of, various hospital personnel, including Ann Cervantes, the emergency room nurse who treated Kelley at Holy Cross Hospital. According to Kelley, if Cervantes had testified, she would have told the jury that Kelley was badly wounded and on pain killers when he allegedly made the inflammatory statement to Russell. The

outcome of the trial would therefore have been different, Kelley argues, because the jury would have disbelieved Russell and concluded that the state was prosecuting the wrong man.

The Court disagrees that Cervantes' testimony would have made any difference in the outcome of the proceedings. As we have already said, Russell's testimony was far from the only evidence linking Kelley to the crime. At least four witnesses besides Russell identified him as the shooter. And, according to the state's evidence, the very people who saw him fire his gun, caught him and held him until the police arrived. In short, Kelley cannot satisfy the second prong of *Strickland v. Washington* with respect to this claim. The Illinois appellate court considered this very claim on its merits and concluded that Kelley could not show prejudice as a result of his attorney's failure to find and call Cervantes. *See People v. Kelley*, No. 1-95-1537 (Sept. 19, 1996) (Order affirming trial court's judgment, pp. 6-7). We think that conclusion comports with *Strickland* and its progeny and therefore conclude that Kelley is not entitled to habeas corpus relief on the basis of his lawyer's failure to seek a continuance. *See* 28 U.S.C. §2254(d)(1) (writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determine by the Supreme Court of the United States").

CONCLUSION

For the reasons explained above, Petitioner Kelley's petition for a writ of habeas corpus is dismissed. The Clerk is directed to enter judgment in favor of respondent.

Dated: March 26, 2001

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MATTHEW F. KENNELLY
United States District Judge